

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.) Case
) No. 1:23-cv-00853-DAE
GREG ABBOTT, in his)
capacity as GOVERNOR OF)
THE STATE OF TEXAS, and)
THE STATE OF TEXAS,)
)
Defendants.)

ORAL DEPOSITION OF
KATHY ANN ALEXANDER, PhD
Monday, July 8, 2024

ORAL DEPOSITION OF KATHY ANN ALEXANDER, PhD,
produced as a witness at the instance of the Plaintiff,
United States of America, and duly sworn, was taken in
the above-styled and numbered cause on the 8th of
July, 2024, from 9:04 a.m. to 11:48 a.m., before Sharon
Ross, Certified Shorthand Reporter in and for the State
of Texas, reported by computerized stenotype machine, at
the US Attorney's Office for the Western District of
Texas, 903 San Jacinto Boulevard, Suite 334, Austin,
Texas 78701, pursuant to the Federal Rules of Civil
Procedure and/or any provisions stated on the record or
attached hereto.

Reported by:
SHARON ROSS, Texas CSR #1961,
Hawaii CSR #432, RMR, CRR, CRC
Realtime Systems Administrator
Job No. CS6783937

1 Q. First sentence there says, "Dr. Alexander is
2 not retained or specially employed to provide expert
3 testimony in this case. Dr. Alexander is a person whose
4 duties regularly involve giving expert testimony in
5 matters relating to water rights" and permitting
6 "management in Texas."

7 Is that a correct -- is that a correct
8 statement?

9 A. That's basically what it says there. I believe
10 that actual text says "expert testimony in matters
11 relating to water rights permitting and management in
12 Texas."

13 Q. Okay. So in your current role at TCEQ, your
14 duties include regularly giving expert testimony on
15 water rights, permitting, and management?

16 A. Yes.

17 Q. And that's what you'll be providing testimony
18 in this case about?

19 A. Yes.

20 Q. So a few lines down in that paragraph, it says,
21 "Dr. Alexander is expected to testify regarding"; and
22 then there is a list where it says, "which includes such
23 as." What -- and the first one is "interbasin
24 transfers."

25 What testimony do you intend to provide

1 Who are the relevant federal, state, local,
2 and tribal entities?

3 A. That's a pretty broad question. Can you --

4 Q. Sure. So maybe like --

5 A. -- narrow that down a little bit?

6 Q. Let's break it up. So you'll -- what testimony
7 do you intend to provide about the relevant federal
8 entities involved?

9 A. So I'm here, again, to provide information on
10 TCEQ's water rights permitting program, Chapter 11, and
11 its implementing regulations.

12 So to the extent that some of our
13 operations are guided by, for example, the International
14 Boundary and Water Commission and its role in ensuring
15 that water is delivered to Texas under the treaty, there
16 may be some information related to that, if I were
17 asked.

18 Q. What is TCEQ's role in implementing the 1944
19 Water Treaty?

20 A. TCEQ doesn't have a role in implementing the
21 treaty. The treaty is intended to provide the water for
22 Texas uses -- uses. And once the water has been
23 provided, then Texas law governs how it's used and how
24 we operate the Rio Grande.

25 Q. And then the last item in the list -- or in the

1 paragraph on Page 8 of Exhibit 1 says "reasonableness of
2 possible improvements to make the Rio Grande River
3 suitable for navigation as proposed by the USA,
4 including between Mile Markers 275.5 and 610."

5 Are you providing -- are you providing an
6 expert opinion on the reasonableness of the possible
7 improvements?

8 A. Yes. That's items 5, 6, and 7 in my opinion.

9 Q. What do you mean by "reasonableness"?

10 A. So if something's not possible, it's probably
11 not reasonable; and I think that's what I've set out in
12 opinions 5, 6, and 7.

13 Q. And then when you say "possible improvements,"
14 are those the two that we discussed earlier, the
15 dredging and the canal?

16 A. The dredging, the locks and dams, new water
17 rights for navigation under Texas law, the items 5, 6,
18 and 7, in my opinion.

19 Q. All right. If you could look at paragraph 1 on
20 Page 9 of Exhibit 1.

21 A. (Witness complies.)

22 Q. It says, quote, "State water is defined by
23 Texas law as 'the ordinary flow, underflow, and tides of
24 every flowing river, natural stream, and lake, and of
25 every bay or arm of the Gulf of Mexico, and the storm

1 requested it.

2 Q. And it could also be an incidental use to
3 another one of the beneficial uses, correct?

4 A. Yes.

5 Q. And so just because water has been appropriated
6 for municipal use doesn't mean that it can't be used for
7 navigation?

8 A. What that -- so what an incidental use is -- is
9 that is as the water is, for example, released from
10 storage to a downstream user, as it travels down the
11 stream to its ultimate beneficial consumptive use, it
12 may have ancillary benefits such as environment -- the
13 environment or navigation or whatever but it's not an
14 additional amount --

15 Q. Uh-huh.

16 A. -- in addition to the municipal use.

17 Q. And so just because there have -- there are no
18 water rights appropriated for navigation doesn't mean
19 that a -- water cannot be navigable, correct?

20 MR. TEBO: Objection, form.

21 A. I don't understand that question at all.

22 Q. (BY MR. HARRISON) Looking at the next two
23 sentences, paragraph 2, it says, "In wa" -- Page 9 --

24 A. Uh-huh.

25 Q. -- "In water rights that authorize navigation,

1 navigation is not the only beneficial use authorized in
2 the water right. Navigation is an incidental use
3 whereby water that is diverted or released for other
4 purposes could also be used to support navigation as
5 part of the water" rights -- "water right holder's
6 operations."

7 And that's what we just talked about?

8 A. Yes.

9 Q. And then the last sentence, it says, "The use
10 of water for navigation would not be in addition to the
11 authorized beneficial purposes of use in the water right
12 such as municipal, agricultural, or industrial use."

13 And that's the same thing that we were
14 also --

15 A. Yes.

16 Q. What in paragraph 2 on Page 9 of Exhibit 1
17 constitutes your expert opinion?

18 A. So just like with statement 1, this is my
19 expert opinion about how water rights for navigation
20 uses or other non-consumptive uses would work in the
21 State of Texas based on my experience in water rights
22 permitting.

23 Q. So moving to paragraph 3, it says, "Water
24 rights in other parts of the state include provisions to
25 protect navigation use, such as subordination of other

1 uses to navigation or cancellation of the water right if
2 the water is needed for navigation. These provisions
3 were included in the water right at the time the
4 water ... was originally granted" -- or "water right was
5 originally granted."

6 Did I read that correctly?

7 A. Yes.

8 Q. And what's the basis for that statement?

9 A. My knowledge of water rights permitting in
10 Texas and what's in particular permits based on 25 years
11 of experience and knowledge of specific permits.

12 Q. And such provisions are not included for any
13 water rights on the Rio Grande --

14 A. No --

15 Q. -- to your knowledge?

16 A. No, they're not.

17 Q. The same question on paragraph 3, what in
18 paragraph 3 constitutes your expert opinion?

19 A. This is based on my 25 years of experience,
20 knowledge of the Water Code and TCEQ's rules and what's
21 embodied in water rights in the State of Texas in terms
22 of their authorizations.

23 (Mr. Johnathan Stone is no longer present.)

24 Q. (BY MR. HARRISON) Paragraph 4 starts at the
25 bottom of Page 9. It says, "TCEQ's Water Rights

1 just asking if you know who the applicants were for
2 those permits.

3 A. So I'm aware of the US Army Corps of Engineers
4 holds a water right for a -- like a duck pond area by
5 Lake Somerville.

6 The Fish and Wildlife Service holds water
7 rights for wildlife refuges.

8 The Bureau of Reclamation was identified as
9 an owner on several of their projects, I believe, in --
10 when they were originally issued.

11 Q. And those would have been issued back in the
12 1950s, '60s, '70s or --

13 A. It would vary depending on kind of when the
14 project was initiated. So I -- you know, I don't have
15 an exact date range to give you.

16 Q. Were any of the Federal Government permits that
17 were issued for purposes of navigation?

18 A. Not that I'm aware of.

19 Q. Were any of the Federal Government permits that
20 you're referencing on the Rio Grande?

21 A. I believe some of the wildlife refuges could be
22 on the Rio Grande, but I'm not like 100 percent sure
23 about that.

24 Q. If we could turn to paragraph 5 on Page 10 of
25 Exhibit 1, it says, quote, "Releasing water solely for

1 the" purposes -- "solely for the purpose of raising the
2 water depth in the Rio Grande for purposes of navigation
3 is not reasonable because in Texas water right would be
4 required" -- I'll stop there.

5 And it cites to Texas Water Code section
6 11.121; is that correct?

7 A. Yes.

8 Q. What do you mean by -- when you say "not
9 reasonable"?

10 A. So if something's not possible, it's not
11 reasonable. I think I've already answered that
12 question.

13 Q. But navigation -- I think we've talked about
14 this. Navigation could be an incidental benefit from
15 other beneficial uses, correct?

16 A. It could be.

17 Q. And so if the use of water was occurring for
18 other beneficial uses and that resulted in benefits for
19 navigational purposes, a water right would not be
20 required, correct?

21 A. Can you state that again?

22 Q. Sure. So if the water -- if the use of the
23 water was occurring for other beneficial uses and
24 navigation was an incidental benefit of that use, they
25 wouldn't need a water right for navigation, would they?

1 A. If someone was using the water for a beneficial
2 purpose of use, navigation, they would need to add that
3 purpose of use to their water right.

4 Q. So the rest of the sentence there says, quote,
5 "acquiring a ... water right would not be possible for
6 the following reasons: a, there is no water available
7 for a new appropriation of water in the Rio Grande."

8 So I think we've talked about this a little
9 bit, but what does that mean?

10 A. That means that in order -- in order to get a
11 new water right or a new appropriation, water has to be
12 found available. That's in section 11.134 of the Texas
13 Water Code.

14 And so there is no water in excess of the
15 needs of the appropriators in the Rio Grande. So that
16 means there's no water available for a new
17 appropriation. All the water has been spoken for.

18 Q. So no water currently available?

19 A. I think there's no water available for a new
20 appropriation in the Rio Grande.

21 Q. Are you also speaking for in the future as
22 well?

23 A. I think there's no water available for
24 appropriation in the Rio Grande.

25 I don't -- I don't under -- I don't -- in

1 you to make that kind of decision -- or I would, anyway.

2 Q. So the second sentence of paragraph 6 says,
3 "TCEQ" -- of paragraph 6 says, "TCEQ has issued water
4 rights for these types of projects; however, acquiring a
5 new or amended water right in the Rio Grande would not
6 be reasonable as outlined in statement 5."

7 When you say "these types of projects,"
8 what do you mean?

9 A. Dredging bank stabilization.

10 Q. Are you aware of a dredging project in the Rio
11 Grande where TCEQ has issued a water right?

12 A. No, but I am aware of dredging projects in
13 other parts of the state where TCEQ has issued a water
14 right because, as I state, if any of the aspect of the
15 project involves storing, taking, or diverting state
16 water, a water right would be required.

17 Q. Are there any other reasons why acquiring a new
18 or amended water right would not be reasonable other
19 than the ones listed in paragraph 5?

20 A. No. I mean, water availability is a threshold
21 question when making a determination on whether a new
22 permit can be granted.

23 And if there's limited to no water
24 available for any uses, then we wouldn't be able to
25 issue a new water right.

1 Q. So the next sentence of paragraph 6 says, "Even
2 if weirs, debris, and other obstacles were removed,
3 releasing water solely for the purpose of raising the
4 water depth in the Rio Grande is also not reasonable
5 because a Texas water right would be required" -- I'll
6 stop there.

7 What is a weir?

8 A. It can be a -- it's a structure that can be put
9 along or in a river.

10 Q. (BY MR. HARRISON) Does surface water get
11 diverted when there are weirs in the water?

12 A. It can be. A weir can be used to facilitate a
13 diversion.

14 Q. And do weirs require a water right permit?

15 A. They can.

16 Q. What do you mean by "debris"?

17 A. I think the intent of that was to talk about if
18 you went and dredged and moved any kind of -- what
19 someone might perceive as obstructions or whatever from
20 the river, that even if you did that, it -- you still
21 couldn't make a release of water outside the incidental
22 uses that we've talked about for navigation purposes
23 without a water right, which is not possible to get.

24 Q. So like debris -- debris would be things like
25 tree limbs or leaves or tree parts, things like that?

1 A. Yeah, or, you know, anything else that could
2 have been put in the waterway.

3 Q. Man-made objects?

4 A. Somebody could put trash or cars or anything
5 like that. It could also be -- people -- people do
6 those sorts of things.

7 Q. And can surface water get diverted when there
8 is debris in the water?

9 A. I mean, if someone has an authorized diversion,
10 they can -- they may -- or it may -- the debris may or
11 may not interfere with their diversion. I mean, that's
12 pretty broad.

13 Q. What do you mean by, quote, "other obstacles"?

14 A. I was just trying to be comprehensive.

15 Q. So would removal of other obstacles potentially
16 require a water right or permit?

17 A. I think it just depends, again, on the nature
18 of the project and the specifics as embodied in the
19 water right permit application.

20 Q. Would other obstacles include nets or netting?

21 A. I mean, I don't know that that's an obstacle
22 but, again, I would have to -- it would depend on
23 project specifics.

24 And, you know, I can't really answer those
25 type of questions without the specific projects in front

1 of me.

2 Q. Would a cableway be an obstacle?

3 A. On obstacle to what?

4 Q. Well, would it constitute an "other obstacle"
5 that you reference in paragraph 6?

6 A. I don't know.

7 Q. Would anchors constitute an obstacle or "other
8 obstacle" that you reference in paragraph 6?

9 A. I wasn't talking specifically when I said
10 "other obstacles." I mean, we could go down a long --

11 Q. Sure.

12 A. -- laundry list if you'd like; but I'm speaking
13 more generally.

14 Q. But is it your opinion, then, that the removal
15 of other obstacles would require a water right or
16 permit?

17 A. If any of that was part of a dredging or bank
18 stabilization project or other project that required
19 storing, taking, or diverting state water, a water right
20 permit from TCEQ would be required.

21 Q. The Texas Water Code prohibits obstructing of
22 any navigable stream, correct?

23 A. There are some provisions related to that.

24 (Alexander Exhibit 6 marked.)

25 Q. (BY MR. HARRISON) I'll show you what's marked

1 not be reasonable because acquiring a new Texas water
2 right would not be possible."

3 I think we've talked about this before.
4 When you say "not be reasonable," is the reasonable
5 standard the same as what you discussed before?

6 A. Yes.

7 Q. And that's because it -- actually is that
8 because the -- a new water right would not be possible
9 to be acquired?

10 A. Yes.

11 Q. Is TCEQ accepting new water rights -- or is
12 TCEQ accepting new water right permit applications for
13 water rights on the Rio Grande currently?

14 A. I'm not aware of any but, again, anyone could
15 certain -- could apply but TCEQ would also look at water
16 availability.

17 And if there's no water available under
18 Texas Water Code 11.134, we wouldn't be able to grant a
19 new water right.

20 So, I mean, someone could apply for
21 anything they wanted to; but that doesn't mean that it
22 can be granted under statute and rule.

23 Q. So are you saying, then, that a congressionally
24 authorized project to aid navigation is impossible
25 because the Corps could not obtain a Texas water right

1 or water use permit?

2 A. I think a Texas water right permit would be
3 required, and I don't believe that would be possible.
4 That's what my opinion says.

5 Q. But the Corps or the federal sponsor could
6 apply for the appropriation to Texas, correct?

7 A. They could apply, yes.

8 Q. Is it possible the Corps could take existing
9 water rights through condemnation if the project
10 authorizes them to do that?

11 A. I don't know.

12 Q. Do you have any new water right application
13 pending from the Corps on these potential navigation
14 projects?

15 A. Not that I'm aware of.

16 Q. And so are you providing an opinion that a
17 water right would not issue based on a nonexistent
18 application to TCEQ?

19 A. Okay. Can --

20 Q. I can rephrase.

21 A. Okay.

22 Q. So there's no pending application that you're
23 aware of for a water right with respect to a
24 hypothetical navigation project, correct?

25 A. That's correct.

1 Q. If TCEQ does not have a pending application,
2 then how are you in a position to prejudge the
3 determination that would be issued as a result of
4 that -- of that application?

5 A. Well, if you're asking me do I know that
6 there -- how do I know that there's no water available
7 for appropriation, I would say 25 years of experience in
8 Texas water rights permitting gives me the ability to
9 make that statement.

10 Q. And you don't see that as a pre-decisional
11 result?

12 A. No. I think that there are various river
13 basins across the state, including the Rio Grande, where
14 it would not be possible to grant a new appropriation of
15 water because the water has already been committed to
16 other users.

17 So it's not -- the Rio Grande isn't special
18 in that respect.

19 Q. You had testified earlier that the Corps had --
20 that you had worked on the Corps water supply reservoirs
21 projects. Could you identify those?

22 A. So I think what I had talked about is that we
23 had worked with the Corps of Engineers on various things
24 related to their water supply reservoirs.

25 I mean, that could range anywhere from the

1 River?

2 A. Yes.

3 Q. And you testified that that included the 1944
4 Water Treaty between the United States and Mexico?

5 A. Yes.

6 Q. Are you also familiar with other binational
7 water treaties that relate to the waters of the Rio
8 Grande River?

9 A. Yes.

10 Q. Is it fair to say that you are generally
11 familiar with the binational treaties that relate to the
12 waters of the Rio Grande River?

13 A. Yes.

14 Q. Did you testify about interactions between TCEQ
15 and the IBWC?

16 A. Okay. I --

17 Q. I'm sorry. Did you testify today concerning
18 typical interactions between TCEQ and the International
19 Boundary and Water Commission?

20 A. Yes, in very general terms.

21 Q. Yeah, in general terms.

22 Did you say that the -- or would you say
23 that the IBWC handles the distribution of waters between
24 the United States and Mexico, whereas TCEQ handles water
25 pit -- permitting to the US share of waters?

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MR. HARRISON: Objection, form.

A. I think that's accurate, yes.

Q. (BY MR. TEBO) And did you testify today that Texas has primary jurisdiction over the US share of waters of the Rio Grande?

A. Yes, I did.

Q. And by that -- I mean, by Texas having primary jurisdiction to the US waters for the Rio Grande, by that phrase did you mean that Texas controls the use of US waters of the Rio Grande?

A. Yes.

Q. Did you also mean by that phrase that state law and not federal law governs the use of those waters?

A. Yes.

Q. Would any use of the Rio Grande's waters by the US Army Corps of Engineers or other federal entities be subject to approval by Texas including through TCEQ?

A. For a water rights permit, yes, it would.

Q. Has any court determined that the Rio Grande River is a navigable stream under state law?

MR. HARRISON: Objection, form.

A. Not that I'm aware of.

Q. (BY MR. TEBO) And does state law itself define the Rio Grande as a navigable stream?